LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
DEC 21 1964
JOHN F. DAVIS, CLERK

# Supreme Court of the United States

**October Term, 1964**

**No. 464**

L. W. HOLT AND E. A. DAWLEY, JR.,
*Petitioners,*

v.

COMMONWEALTH OF VIRGINIA,
*Respondent.*

## RESPONSE TO THE PETITION FOR A WRIT OF CERTIORARI

ROBERT Y. BUTTON
*Attorney General of Virginia*

D. GARDINER TYLER
*Assistant Attorney General*

Supreme Court-State Library Building
Richmond, Virginia 23219

## TABLE OF CONTENTS


| | Page |
|---|---|
| OPINION BELOW | 1 |
| CONSTITUTIONAL PROVISIONS ALLEGEDLY VIOLATED | 1 |
| STATEMENT OF THE CASE | 2 |
| ARGUMENT | 7 |
| I. Petitioners Were Not Denied Due Process Of Law | 7 |
| II. Petitioners Were Not Subject To Harrassment In This Contempt Proceeding On Account Of Being "Civil Right Lawyers" | 15 |
| CONCLUSION | 19 |


## TABLE OF CITATIONS

### Cases


| | |
|---|---|
| E. A. Dawley, Jr. v. Commonwealth of Virginia, 205 Va. ...., 136 S.E. (2d) 809 | 1 |
| Ex Parte Terry, 128 U. S. 289, 32 L. Ed. 405, 410 | 16 |
| Fisher v. Pace, 336 U. S. 155, 159, 93 L. Ed. 569, 573 | 17 |
| L. W. Holt v. Commonwealth of Virginia, Record No. 5630 | 1 |
| Jordan v. Hutchinson, 323 F. (2d) 597 | 6 |
| Leavenworth County v. Barnes, 94 U. S. 70 | 12 |
| Re McConnell, 370 U. S. 230, 236 | 10 |
| Re Oliver, 333 U. S. 257 | 12 |
| Ungar v. Sarafite, 376 U. S. 575, 84 S. Ct. 841, 11 L. Ed. (2d) 921 | 13 |

## Other Authorities


*Page*

Code of Virginia (1950) as amended:

Section 18.1-292 ..... 2, 8

Section 19.1-7 ..... 8

Section 19.1-282 ..... 8

Constitution of the United States, Fourteenth Amendment ..... 1

Dangel, Contempt, Section 118 ..... 15

18 U.S.C.A., Section 401 ..... 11

20 U.S.C., Section 1257 ..... 2

# Supreme Court of the United States

**October Term, 1964**

No. .....

L. W. HOLT AND E. A. DAWLEY, JR.,
*Petitioners,*

v.

COMMONWEALTH OF VIRGINIA,
*Respondent.*

## RESPONSE TO THE PETITION FOR A WRIT OF CERTIORARI

### OPINION BELOW

The conviction of petitioners (hereinafter sometimes referred to as defendants) was affirmed by the Supreme Court of Appeals of Virginia, as shown by the opinion of that Court reported in the cases of *L. W. Holt* v. *Commonwealth of Virginia,* Record No. 5630, and *E. A. Dawley, Jr.* v. *Commonwealth of Virginia,* 205 Va....., 136 S. E. (2d) 809. The two cases were heard together. The judgment of the Court was entered on June 15, 1964.

### CONSTITUTIONAL PROVISIONS ALLEGEDLY VIOLATED

1. The Fourteenth Amendment to the Constitution of the United States.

2. The jurisdiction of this Court is said to be invoked under 20 U.S.C., Section 1257.

## STATEMENT OF THE CASE

It is well for this Court to bear in mind just what this case really is and not be misled by the distortion of the evidence made by counsel for petitioners. Counsel would have you believe that these petitioners were punished for contempt because they are members of the bar who represent so-called civil rights litigants. This is not correct. They were punished because they were in contempt of court for the reason they insulted the presiding judge of the Third Judicial Circuit of Virginia, in open court. The power to punish by contempt should be spelled out clearly by statute and not left to conjecture. The Virginia statute, Code Section 18.1-292, Code of Virginia* is clear and distinct.

E. A. Dawley, Jr. was counsel for the defendants in the case of *Hopewell News, Incorporated* v. *Curtis Harris, et al.* This case was set for trial in the Circuit Court of the City of Hopewell on October 5, 1961. Subpoenas were issued for the appearance of the twelve defendants. The City Sergeant

*"The courts and judges may issue attachments for contempt, and punish them summarily, only in the cases following:

"(1) Misbehavior in the presence of the court, or so near thereto as to obstruct or interrupt the administration of justice;

"(2) Violence, or threats of violence, to a judge or officer of the court, or to a juror, witness or party going to, attending or returning from the court, for or in respect of any act or proceeding had or to be had in such court;

"(3) Vile, contemptuous or insulting language addressed to or published of a judge for or in respect of any act or proceeding had, or to be had, in such court, or like language used in his presence and intended for his hearing for or in respect of such act or proceeding;

"(4) Misbehavior of an officer of the court in his official character;

"(5) Disobedience or resistance of an officer of the court, juror, witness or other person to any lawful process, judgment, decree or order of the court." Section 18.1-292 Code of Virginia 1950, as amended.

reported to the Court on October 5 that defendants could not be found. The Court directed that other additional subpoenas be issued, returnable on October 6. This direction was done in the presence of E. A. Dawley, Jr. On October 6 the Sergeant again reported that the defendants could not be found.

On that day, an agreement was reached between the parties, and while the dismissal order was being prepared, Curtis W. Harris, one of the defendants who had been twice summoned was seen in consultation with E. A. Dawley in the court room. After the final order was entered dismissing the said suit as "Dismissed Agreed," Judge Holladay had the clerk of the court and counsel, including Dawley, appear before him in chambers. There the Judge "asked Dawley whether he, Dawley, had anything to do with the said witnesses [those having been summoned on two occasions] being unavailable to be served with subpoenas" (R. 13). The question was propounded three times to Dawley. He failed and refused to answer. He requested time to consider same. Thereupon, the court directed him to appear on October 10, 1961, at ten o'clock. On that day, he was again given an opportunity to give his answer to the said question, which he failed to do. The matter was continued until December 11th. On that date (December 11) Holt stated to the court that he did not represent Dawley. "I am out of the case at this moment, if there is a case" (R. 17). The Judge then directed the Commonwealth's Attorney to prepare a show cause order against Dawley, which rule was made returnable January 8, 1962, to show why he (Dawley) should not be held in contempt. Dawley moved that the Commonwealth file a bill of particulars, which motion was granted. The bill of particulars is found on R. 7 and 8 of the record. On January 8 the hearing on the rule was continued until January 30, 1962. Motion for change of venue was

filed on January 17, 1962. Pertinent parts thereof are found on R. 8 and R. 9.

As the alleged contempt of Dawley resulted from action committed *in the presence of the court* on October 6, 1961, the contempt was punishable summarily under Section 18.1-292, *supra*. Surely, the Judge could not ignore such conduct. The court's question to Dawley was entirely proper. Here we had a situation where for some unknown reason the twelve clients of Dawley could not be found by the City Sergeant to be served with subpoenas. The case had been postponed on October 5th for this reason. The same thing occurred for a second time when the sergeant sought to serve the subpoenas. Dawley was present on October 5th and heard Judge Holladay direct the sergeant to again attempt to serve the subpoenas. How Harris happened to be with Dawley during the time the dismissal order was being prepared is not known. The question asked of Dawley by the Judge was a very simple one, "whether he, Dawley, had anything to do with the witnesses being unavailable," which called for a direct and prompt answer from a lawyer as an officer of the court whose duty it was to be fair to the court in such matters. Instead of giving the court an answer then and there, Dawley failed to answer the question. Judge Holladay, at Dawley's request, gave him time to consider his answer and set the matter down for October 10, as stated above. The matter was continued again and again so as to give Dawley ample time to answer the question or show the Court why he should not be compelled to answer. Whether Judge Holladay was in error in overruling the motion made by Dawley (on December 20, 1961) to disqualify himself is a matter which could have been decided by the Supreme Court of Appeals of Virginia, but as the first contempt case was never concluded, that question was never determined and same Is Not Before This Honorable Court. Nor

is the propriety of the Judge's ruling on the motion for a change of venue before this Court.

The complete stenographic record of the hearing on January 30, 1962, at which time the contempt was committed, is found on R. 16 to R. 29, inclusive. Nothing of any consequence transpired before argument was made by Holt on the *motion for a change of venue* (R. 18). The argument largely consisted of reading the motion to the Court (R. 20, 21). In the course of the argument, the following was stated:

> "... The said Honorable Judge Carleton E. Holladay . . . is now is effect and/or in fact acting in the capacity of police officer, chief prosecution witness, adverse witness for the defense, grand jury, chief prosecutor and judge; that in addition to the foregoing the said Judge Carleton E. Holladay did intimidate and harass the lawyer representing E. H. Dawley, Leonard W. Holt, Esq."

The written motion for change of venue which was signed by E. A. Dawley, Jr. contained this statement:

> "The said Judge Carleton E. Holladay . . . has with respect to said contempt action and is now in effect and/or in fact acting as police officer, chief prosecuting witness, adverse witness for the defense, grand jury, chief prosecutor and judge.
>
> "That in addition to the foregoing, said Judge Carleton E. Holladay did intimidate and harass and is intimidating and harassing the lawyer representing said E. A. Dawley, Jr., viz, Leonard W. Holt, Esq." (R. 8, 9).

At the conclusion of the argument made by Holt, the Court announced "that the plea is contemptuous, I think the argument is contemptuous." At that time, both E. A.

Dawley, Jr. and Leonard W. Holt were summarily adjudged to be in contempt of court.

Before fixing the punishment, the Court overruled the motion for a change of venue [in the first contempt case] (R. 23), after which a dialogue between L. W. Holt and the Court ensued in which the defendants registered a supposed disclaimer of intent, which was characterized by the Supreme Court of Appeals of Virginia as follows:

> "These unintelligible remarks consume several pages of the record, and we cannot gather from what the attorney says that he is in any way attempting in good faith to apologize."

At the conclusion of this colloquy, the Court fined each of the defendants $50.00. It is from this judgment that an appeal was taken to the Supreme Court of Appeals of Virginia, and is now before this Court.

On pages 5 and 6 of their brief, counsel for the petitioners go outside the record in their struggle to vindicate the conduct of these petitioners. They tell the Court that the law firm of which the petitioners were partners was embroiled in litigation with the Virginia Legislative Committee on Offenses Against the Administration of Justice before the Federal Court for the Eastern District of Virginia (209 F. Supp. 131) during the fall of 1961. Of course, they failed to connect Judge Holladay with that case because the Judge had nothing at all to do with the same. The incident which precipitated the *Jordan* case (*Jordan* v. *Hutchinson*, 323 F. (2d) 597) occurred in the City of Norfolk, far removed from the City of Hopewell. The bald and unwarranted statement of counsel that the pendency of said case was a related circumstance to the case at bar is not supported by the facts and apparently is a deliberate attempt to prejudice this Court against the Commonwealth of Virginia in *this case*

If counsel's argument is sound then it would mean that the mere existence of said litigation in the Federal Court by the law firm with which the petitioners were partners would be a license for the petitioners to insult any judge in any State Court throughout Virginia, because all judges throughout Virginia would be charged with the knowledge of such pending case and would thereby be "affected by the prejudice which gripped so many other members of the community." Such an argument is too far fetched to receive serious consideration.

To repeat, there is nothing in this record to indicate to the slightest degree that Judge Holladay was affected by the alleged community prejudice.

## ARGUMENT

### I.

### Petitioners Were Not Denied Due Process of Law.

Petitioners argue, on pages 7 and 8 of their brief, that their conviction for contempt based upon the contents of a motion for a change of venue denied one of them as a litigant in the State Court the right guaranteed by the due process clause of the Fourteenth Amendment to be prosecuted in an impartial forum and denied the other as the litigant's attorney the right to represent his client effectively.

We agree with the statement made by counsel on page 7 "that a party cannot be punished for filing such a motion (motion for a change of venue) nor can his lawyer be penalized for arguing it." Petitioners were not punished for filing and arguing a motion for the change of venue. They were punished for filing a motion for a change of venue containing abusive, contemptuous and contemptible language concerning the trial judge and while arguing the motion in open court and using the same abusive language.

Whether there were grounds for a change of venue or for the disqualification of the judge are not issues in this case. As heretofore pointed out, these issues were not presented to the State appellate court for determination as the first contempt case was never brought to a conclusion and neither are these issues presented here. The only question presented here is: "Whether these petitioners were guilty of contempt of court." Petitioners were not denied due process of law. On the contrary, they were afforded all the rights and remedies by the courts of Virginia in determining said issue. By the Virginia statute (19.1-282 of the Code) they were granted a writ of error to the Supreme Court of Appeals to have the action of Judge Holladay in adjudging them in contempt reviewed.

There is no provision in the statute, to-wit, Virginia Code Section 18.1-292, or in any other statute that provides for disqualification of a judge in a contempt proceeding where the acts of contempt are committed in the presence of the judge. If Section 19.1-7* does apply in cases of contempt (and we doubt that it does because the question has never been determined by the Virginia courts) the Judge himself must determine whether it is proper that he should preside. His act, of course, would be reviewed by the Supreme Court of Appeals and the question there would be whether he abused his discretion in not disqualifying himself.

Is there any evidence disclosed in the record to show that Judge Holladay abused his discretion in not disqualifying himself after he held the pleading and argument filed and

*"When the judge of a circuit or corporation court in which a prosecution is pending is connected with the accused or party injured, or is so situated in respect to the case as in his opinion to render it improper that he should preside at the trial, he shall enter the fact of record and the clerk of the court shall at once certify this fact to the Chief Justice of the Supreme Court of Appeals and thereupon another judge shall be appointed, in the manner prescribed by §17-7, to preside at the trial."

made by the petitioners were contemptuous and before fixing the punishment? If there is such evidence, we are unable to find it, and furthermore we do not believe that it can be found.*

Counsel would have this Court believe that Judge Holladay's action interfered with Holt's professional duty to effectively represent his client Dawley. This is not correct. The only thing appearing in the record concerning the argument on the motion (exclusive of the motion itself) is this:

"The Court:

* * *

"I believe you all have a plea filed here for change of venue?

"Mr. Holt:
"Yes, sir.

"The Court:
"I'm ready to hear you on that.

*The Supreme Court of Appeals of Virginia, in answering the argument presented by petitioners for a change in venue and for the disqualification of the Judge, had this to say (205 Va. 339):

"The statutory authority for change of venue in criminal cases in Virginia is codified as §19.1-224 of the Code and we cannot believe that the motion for a change of venue in the [first] contempt case against Dawley [for his alleged actions in interfering with the process of the court] was addressed, in good faith, to the sound discretion of the trial court under that statute. We have been referred to no statute in Virginia which would require a judge to disqualify himself in a contempt proceeding.

"Even if there existed grounds for compelling disqualification of the trial judge in such proceeding, it is well settled that a motion directed to that ground must confine itself to pertinent facts relied upon to establish the ground. The written motion cannot be used as a vehicle for launching a personal attack upon the integrity or honor of the court. 12 Am. Jur., Contempt, *supra*, §13, page 398; 29 A.L.R. 1273."

"Mr. Holt:

"May it please the Court, the defendant, E. A. Dawley, Jr., represents as follows on motion for change of venue:

(Then follows the argument):

"The Court: Next we have action of the Court on a motion for change of venue. Mr. Jones, do you wish to be heard on that?

"Mr. Jones: No, your honor. I don't think there's any argument that I would present at this time.

"I wholly concur with the Court that that is contemptuous, and I don't propose to answer it at all.

"Mr. Holt: May we at this time, my client and I, ask again of the Court—the motion for jury trial—My understanding was that you denied this earlier.

"The Court: I have not passed on the motion for jury trial at this time. I think that I would have to pass on the motion for change of venue before I would for a jury trial.

"We first have to find out whether we are going to try it in this Court, and then we will determine whether or not it is a jury trial.

"If there is nothing further to be heard on the motion for change of venue, the Court is ready to rule on it.

"Motion is denied.

"Mr. Holt: May we note an exception, sir.

"The Court: Let the record show the exception."

To substantiate his argument, counsel cites the case of *Re McConnell*, 370 U. S. 230, 236, quoting certain dictum therefrom. The situation in the *McConnell* case was entirely different from the case at bar. There, the trial court had instructed attorneys to refrain from asking questions on subjects which the court had ruled not admissible. McConnell felt that the trial court was in error in this particular

(which in fact it was) and he felt that he must ask the questions in order to make up the record for an appeal (if necessary). He stated to the court that he was going to ask the questions until stopped by some bailiff. Thereupon, the court recessed. After the resumption of the trial, McConnell did not ask the questions. This Court reversed, thereby construing 18 U.S.C.A., Section 401,* to apply the cases where the misbehavior of the alleged contemptor amounts to an actual obstruction of the administration of justice. Mr. Justice Harlan pointed out in a dissenting opinion, joined by Mr. Justice Stewart, that he did not believe that the Court intended in its opinion to mean that only a physical obstruction appending judicial proceedings is punishable under the said federal statute, citing many cases decided by this Court to the effect that "the Court's power to punish summarily for contempt has always been available as a sanction against the use of abusive and insulting language" (82 S. Ct. 1293).

Be that as it may, the Court in this case is not called upon to apply the provisions of the federal statute. Here the Court must apply the Virginia statute (Section 18.1-292, Code of Virginia (1950)), which statute is broader than the act of Congress and vests the courts of Virginia with the specific power to punish summarily for contempt as a sanction against the use of abusive and insulting language. The Supreme Court of Appeals of Virginia, in passing upon the question of whether or not the conduct of the petitioner amounted to contempt within the meaning of the Virginia statute, stated (205 Va. 338):

---

*"§401. *Power of court*

"A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—

"(1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;

"(2) Misbehavior of any of its officers in their official transactions;

"(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command. June 25, 1948, c. 645, 62 Stat. 701."

"We next consider the question, was contemners' attack upon the trial court contemptuous, warranting summary punishment?

"We hold that it was. When one considers the incidents surrounding the motion for change of venue, the affidavit and argument thereon, it would be difficult to imagine a more callous attack upon a court by an attorney who is privileged to practice his profession therein. The language employed was both contemptuous and contemptible. It was intended to be insulting. The motion for change of venue was simply used as a vehicle to heap insults upon the court, a studied attempt to smear the judge. 12 Am. Jur., Contempt, *supra,* §11, page 396. He was charged with:

"(1) Acting as police officer, chief prosecution witness, adverse witness for the defense, grand jury, chief prosecutor, and judge;

"(2) Harassing and intimidating counsel for the accused;

"(3) Being unable to conduct a fair and impartial trial.

"It would strain one's imagination to picture a clearer example of contempt, either at common law or under the statute. However, it is unnecessary to consider whether the conduct of the appellants would warrant summary punishment at common law. Their offense comes within the purview of Section 18.1-292 of the Code of Virginia 1950 as amended."

The decision on the Virginia statute made by the Virginia Supreme Court of Appeals should be followed by this Honorable Court. *Leavenworth County* v. *Barnes,* 94 U. S 70.

Counsel seeks to equate the case at bar with the case of *In re Oliver,* 333 U. S. 257. Similarity between the two cases is totally lacking. Oliver appeared before a circuit court

judge who was conducting in accordance with Michigan law a "one man grand jury investigation." The hearing was conducted in the Judge's chambers from which the public was excluded. During the course of the secret session after hearing evidence from another witness and from Oliver, the Judge, believing that Oliver was not telling the truth, summarily held him in contempt. No opportunity was afforded Oliver to offer an explanation or a defense. This Court released Oliver in a habeas corpus proceeding, holding that the commitment constituted a denial of due process on the ground (1) of the secrecy of the proceeding and (2) of lack of reasonable opportunity to be heard on the contempt charge. The case at bar differs from *Oliver* in two respects. First, petitioners were adjudged in contempt in open court and, secondly, no explanation could disprove the fact that petitioners had committed such contempt of the court's authority and dignity which deserved instant punishment, thus coming within the second exception to the holding of Mr. Justice Goldberg that the Constitution forbids a judge to impose punishment for such contempt without notice or hearing, expressed in his dissenting opinion in the case of *Ungar* v. *Sarafite,* 376 U. S. 575, 84 S. Ct. 841, 11 L. Ed. (2d) 921.*

In that case, the Court, in affirming a judgment of the Supreme Court of New York, held that the remarks of a wit-

*"I would hold, therefore, that the Constitution forbids a judge to impose punishment for such contempt without notice or hearing, except when (1) the contempt creates such 'an open threat to the orderly procedure of the court. * * [that if] not instantly suppressed and punished, demoralization of the court's authority will follow.' *In re Oliver, supra,* at 275 of 333 U.S., at 508 of 68 S. Ct. 92., 92 L. Ed. 682, quoting *Cooke* v. *United States,* 267 U.S. 517, 536, 45 S. Ct. 390, 394, 69 L. Ed. 767, and when (2) 'no explanation could mitigate [contemner's] offense, or disprove the fact that he had committed such contempt of [the court's] authority and dignity as deserved instant punishment.' Ex parte Terry, 128 U.S. 289, 310, 9 S. Ct. 77, 81, 32 L. Ed. 405." (84 S. Ct. 857).

ness that he was being badgered and coerced and that the Court was suppressing evidence, did not constitute such a personal attack on the Judge as to require his disqualification. We submit that applying the standards governing contempt convictions which this Court has applied in federal cases, there is nothing in this record which indicates that Judge Hollaway should have disqualified himself as the action taken by him in holding petitioners in contempt was necessary to maintain the authority and dignity of the Court over which he presided.

Counsel in the petition on page 8 makes this statement:

> "The language of the motion itself is obviously well within the perimeter of the decorous pleading."

We do not agree with the learned counsel. If it is customary for attorneys to use such language in pleadings in the jurisdictions in which said counsel habitually practice, it is of no concern to us, but such a practice is simply not tolerated in Virginia where the members of the Bar take pride in maintaining the respect of the courts.

The Supreme Court of Appeals of Virginia had this to say in reference to the duty of attorneys in respect to their relationship with the Court:

> "Both appellants are attorneys. They are officers of the court. It was their duty as attorneys to maintain the respect due the court; a duty imposed upon them which clearly should exceed that imposed upon the public generally. This duty should not be looked upon lightly and cannot be shirked under the guise of representing the interests of a party litigant. The attorney's privilege to appear in court is not a license to attack the court; nor does the privilege of filing pleadings and motions grant a license to insult, abuse and slander the court, however unhappy the client and attorney may be with the particular court. See numerous cases an-

notated on this point in 18 A.L.R. 213, 55 A.L.R. 530; 52 A.L.R. 2d 1297. See also Dangel, 'Contempt,' §118, at page 58; 12 Am. Jur., Contempt, *supra,* §13, at pages 397-398." (205 Va. 339).

**II.**

**Petitioners Were Not Subject to Harrassment in This Contempt Proceeding on Account of Being "Civil Right Lawyers"**

We do not understand the petitioners' argument made in this connection. Counsel representing unpopular causes have no greater privileges to practice than counsel in other cases. The adjudication that petitioners were in contempt did not arise in a case while the petitioners were representing "civil rights litigants," whatever that term may mean. Certainly, the mere fact that petitioners as attorneys had represented civil rights litigants in the past gave them no license to use abusive language towards the Judge in pleadings filed and in arguments made. The written motion for a change of venue was filed on January 17, 1962, some nine days after the last contact the petitioners had with the Judge at the hearing on January 8, 1962. The argument on said motion was made on January 3, 1962, some twenty-two days after said hearing on January 28, 1962. Hence, it is obvious that the petitioners' conduct in this respect amount to a deliberate attack on the integrity of the court and designed for no other reason than to bring the court in disrepute. It is the duty of an attorney to refrain from abusive language and maintain a respectful bearing toward the court. Dangel, Contempt, Section 118. Regardless of how the petitioners may have felt towards the Judge and regardless of how they may have believed that there was a hostile feeling towards them in the community, this constituted no reason to launch a personal attack on the integrity and honesty of the Judge. Certainly, the mere fact that they had represented civil rights litigants in the past gave them no license to do this.

In *Ex Parte Terry,* 128 U. S. 289, 32 L. Ed. 405, 410, in refusing to grant relief in a habeas corpus proceeding to the applicant who was imprisoned as a result of being held in contempt of court, the Court stated:

> "It is true, as counsel suggest, that the power which the court has of instantly punishing, without further proof or examination, contempts committed in its presence, is one that may be abused and may sometimes be exercised hastily or arbitrarily. But that is not an argument to disprove either its existence or the necessity of its being lodged in the courts. That power cannot be denied them without inviting or causing such obstruction to the orderly and impartial administration of justice as would endanger the rights and safety of the entire community. What was said in *Ex parte Kearney,* 20 U. S. 7 Wheat. 39, 45 [5:391, 393], may be here repeated: 'Wherever power is lodged it may be abused. But this forms no solid objection against its exercise. Confidence must be reposed somewhere; and if there should be an abuse, it will be a public grievance, for which a remedy may be applied by the Legislature, and is not to be devised by courts of justice."
>
> * * *
>
> "We have not overlooked the earnest contention of petitioner's counsel that the circuit court, in disregard of the fundamental principles of Magna Charta, in the absence of the accused, and without giving him any notice of the accusation against him, or any opportunity to be heard, proceeded 'to accuse, to try, and to pronounce judgment, and to order him to be imprisoned; this, for an alleged offense committed at a time preceding, and separated from, the commencement of his prosecution.' We have seen that it is *a settled doctrine* in the jurisprudence both of England and of this country, never supposed to be in conflict with the liberty of the citizen, that for direct contempts committed *in the face of the court,* at least one of superior jurisdic-

tion, *the offender may,* in its discretion, be instantly apprehended and *immediately imprisoned,* without trial or issue, and without other proof than its *actual knowledge of what occurred;* and that, according to an unbroken chain of authorities, reaching back to the earliest times, such power, although arbitrary in its nature and liable to abuse, is absolutely essential to the protection of the courts in the discharge of their functions. Without it, judicial tribunals would be at the mercy of the disorderly and violent, who respect neither the laws enacted for the vindication of public and private rights, nor the officers charged with the duty of administering them. To say, in case of a contempt such as is recited in the order below, that the offender was accused, tried, adjudged to be guilty, and imprisoned, without previous notice of the accusation against him and without an opportunity to be heard, is nothing more than an argument or protest against investing any court, however exalted, or however extensive its general jurisdiction, with the power of proceeding summarily, without further proof or trial, for direct contempts committed in its presence." (128 U. S. 412.) (Italics supplied.)

In *Fisher* v. *Pace,* 336 U. S. 155, 159, 93 L. Ed. 569, 573:

"Historically and rationally the inherent power of courts to punish contempts in the face of the court without further proof of facts and without aid of jury is not open to question. This attribute of courts is essential to preserve their authority and to prevent the administration of justice from falling into disrepute. Such summary conviction and punishment accords due process of law."

* * *

"The judgment of the Supreme Court of Texas must be affirmed. In a case of this type the transcript of the record cannot convey to us the complete picture of the courtroom scene. It does not depict such elements of

> misbehavior as expression, manner of speaking, bearing, and attitude of the petitioner. Reliance must be placed upon the fairness and objectivity of the presiding judge."

It is abundantly clear that this Honorable Court has long recognized that courts may punish for contempt when the contempt is committed in the actual presence of the court and that public policy demands that reliance and confidence must be placed in the presiding judge, be that judge a Federal judge or a State judge. In either category, the judge represents the majesty of the law upon which orderly society rests. His actions in this particular should not be impeded except for compelling reasons. No such reasons appear in the case at bar.

On page 11 of the petition there is stated:

> "The Judge should have gladly disqualified himself or granted a change in venue. But he insisted on proceeding summarily."

This statement is confusing as it is apparently in reference to the *first* contempt case which was never concluded. In that case, the Judge did not proceed summarily. Full opportunity was given Dawley to file pleadings in the case and argue the motion for change of venue. It was a result of the filing of the motion and the argument thereon that resulted in the action of the Judge in finding the petitioners guilty of contempt summarily. There was no reason for the Judge to disqualify himself or order a change of venue as the contempt was committed in his presence. His summary action was necessary to maintain the authority and dignity of the court over which he presided.

The naked allegation in the petition made on page 11 that Judge Holladay "displayed that he too was affected by the prejudice which gripped so many other members of the

community" is not borne out by the evidence and is a mere conjecture on the part of counsel. This statement casts aspersion on Judge Holladay, an able member of the State judiciary, which counsel for the Commonwealth deeply resent.

Mr. Justice Whittle, in the Court's opinion on behalf of the Supreme Court of Appeals of Virginia in the case at bar, made this apt observation:

> "It would strain one's imagination to picture a clear example of contempt, either at common law or under the statute." (205 Va. 338).

If attorneys are permitted to insult judges as these petitioners did Judge Holladay, and not be punished, then the judicial system, both Federal and State, will be weakened and fall into disrepute.

## CONCLUSION

We maintain that the petition fails to present a substantial federal question. The petitioners were accorded due process of law and the judgment of the Supreme Court of Appeals of Virginia does not deprive them of any rights guaranteed under the Constitution of the United States, and that the said judgment is correct and should be affirmed

Respectfully submitted,

ROBERT Y. BUTTON
*Attorney General of Virginia*

D. GARDINER TYLER
*Assistant Attorney General*

Supreme Court-State Library Building
Richmond, Virginia 23219

**CERTIFICATE OF SERVICE**

I hereby certify that I have forwarded a copy of the foregoing Response to Melvin L. Wulf, Esq., Leslie Harold Levinson, Esq., Joseph A. Jordan, Esq., Edward A. Dawley, Esq., and Len W. Holt, Esq., counsel for petitioners, by depositing the same in a United States post office mail box, with first class postage prepaid, at their addresses shown of record to be c/o American Civil Liberties Union, 156 Fifth Avenue, New York 10, New York, on this 18th day of December, 1964.

D. GARDINER TYLER
*Assistant Attorney General*